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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH S. HOPPER,
WARDEN,

Petitioner,

v.

JAMES ANDREW JOHNSON,
A/K/A JERRY LEON BROOKS,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under Cuyler v. Sullivan, 446 U.S. 335 (1980), prejudice is not to be presumed when an attorney is confronted with a conflict of interest, but rather, in order for a Sixth Amendment violation to be established, there must be shown to have existed an "actual conflict of interest adversely affecting an attorney's performance?"

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OPINIONS BELOW

The published opinion of the Court of Appeals for the Fifth Circuit is

reported as Johnson v. Hopper, 639 F.2d 236 (5th Cir. 1981). A copy of the opinion is also attached as Appendix "A" to this brief. An earlier opinion of the United States Court of Appeals for the Fifth Circuit remanding the case for an evidentiary hearing, is reported as Brooks v. Hopper, 597 F.2d 57 (5th Cir. 1979). A copy of this order is attached to this brief as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 12, 1981. See Johnson v. Hopper, 639 F.2d 239 (5th Cir. 1981). A timely petition for rehearing en banc was denied on April 9, 1981. (A copy of this denial is contained in the Appendix). The Court of Appeals for the Fifth Circuit granted

the Petitioner's motion for a stay of the issuance of the mandate pending this petition for writ of certiorari on April 21, 1981. This petition for a writ of certiorari has been filed within the allowable ninety days of the judgment of the Court of Appeals for the Fifth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Respondent, James Andrew Johnson, a/k/a Jerry Leon Brooks, was tried in the Superior Court of Muscogee County, Georgia along with codefendants James Lewis Adkins and Walter H. Springer on five counts of armed robbery. The joint indictment alleges that Respondent and his two codefendants had robbed the V.V. Vick Jewelry store in Columbus, Georgia on May 24, 1975. Respondent's trial took place in the Superior Court of Muscogee County, Georgia, on June 22, 1976. Respondent and his two codefendants were convicted on all five counts of armed robbery and each received five consecutive life sentences. Respondent

did not appeal his convictions and sentences.

Respondent's court-appointed attorney, Mr. Cain, indicated when he testified at Respondent's state habeas corpus hearing, that he approached the trial judge two weeks before Respondent's trial and advised the trial judge of the fact that he believed a conflict of interest existed. As noted by the state habeas corpus court, Mr. Cain testified that he requested that another attorney be appointed to represent Respondent or his codefendants, but that the trial judge asked Mr. Cain to state specifically his reasons upon which the judge might justify a finding that a conflict of interest existed. Mr. Cain refused to justify his belief that a conflict of interest existed, on the

basis that it would violate the attorney-client privilege. Due to Mr. Cain's refusal to substantiate his claim that a conflict of interest existed, the trial court overruled Mr. Cain's motion for appointment of separate counsel.

At trial, numerous eyewitnesses present at the V.V. Vick Jewelry store in Columbus, Georgia, on the day of the robberies, testified on behalf of the prosecution. Although not all of these eyewitnesses could identify Respondent and his codefendants, various eyewitnesses identified one or more of the codefendants. Respondent and his codefendant James Adkins were identified by Bertice Spears, an employee at Vick's Jewelers. (See record of the lower court, Volume II, p. 47).[1/]

[1/] References to the lower court's record will hereinafter be designated as "R.", followed by the appropriate volume of the record and the appropriate page number.

Emery Kersey identified both the Respondent and his two codefendants (R., Vol. II, p. 79-81). Sara Mazeika, a customer at the jewelry store on the day of the robbery, identified Respondent and codefendant Springer (R., Vol. II, p. 135-136). Other eyewitnesses identified one or both of Respondent's codefendants. (R., Vol. II, p. 66-67; 102; 114; 122; 147; 164-165).

Additionally, the state produced the testimony that the Buick automobile recovered during the investigation of the robbery at the Riverview Apartments in Phoenix City, Alabama, across the river from Columbus, Georgia, was the car of Respondent. (R., Vol. III, p. 234; 244-246). The Buick had been observed by witnesses leaving the scene of the crime. (R., Vol. III, p. 208-209).

Respondent took the stand and testified in his own behalf, stating that he was in Atlanta, Georgia on the day of the robbery of Vick's Jewelry Store. (R., Vol. III, p. 270). Respondent admitted purchasing the automobile which had been seen leaving the scene of the crime, but stated that he did not have a valid Georgia driver's license since he had purchased the car. (R., Vol. III, p. 271). He claimed that his car had been stolen. (R., Vol. III, p. 272). Respondent denied having known codefendant Adkins in May of 1975 at the time of the robbery. (R., Vol. III, p. 277).

Following Respondent's testimony, codefendant Springer took the stand and testified that he was in Atlanta, Georgia on the day of the robbery and that he did not leave the city on that date.

(R., Vol. III, p. 292). Mr. Adkins testified last of the three codefendants. He was questioned by his own counsel as to how a notebook with his name on it was found in the automobile having been identified as being present at the scene of the crime. Mr. Adkins stated that his notebook was stolen when his apartment in Atlanta was burglarized. (R., Vol. III, p. 294-295). Mr. Adkins denied having ever ridden in the automobile belonging to the Respondent. (R., Vol. III, p. 298). He further denied ever having taken a trip with Respondent or Mr. Springer outside of Atlanta, Georgia (R., Vol. III, p. 298-299).

On cross-examination by the Assistant District Attorney, Mr. Adkins stated that he had known the Respondent since 1972 but had never ridden in his car.

(R., Vol. III, p. 301-302). Mr. Adkins stated that the Respondent was in Phoenix City on May 24, because the Respondent had called him there. (R., Vol. III, p. 302-303). Following this testimony, the district attorney asked Mr. Adkins:

> "Let me ask you this: When is the first time you have related this account of what happened the night of that robbery, when is the first time you told about this defendant calling you in Atlanta, Georgia."

(R., Vol. III, p. 303).

Mr. Adkins responded, "That is the first time that it has been asked me." (R., Vol. III, p. 304).

Certain rebuttal evidence was put forth by the state, identifying the Respondent and Springer as having been present in an apartment in Columbus on

the day that Vick's Jewelry store was robbed. (R., Vol. III, p. 310-311). Respondent's attorney countered with rebuttal evidence of his own in the form of the testimony of Walter Springer, that he had never been in Columbus, Georgia, and had not visited this apartment. (R., Vol. III, p. 332). Respondent had previously denied being at this apartment. (R., Vol. III, p. 274).

After the jury had been charged and retired to the jury room for their deliberations, the trial court told Mr. Cain that he would take up any motions. One of the motions considered by the court at this time was the previous motion filed by Mr. Cain for the appointment of separate counsel based on his belief that a conflict of interest existed. (R., Vol. III, p. 351).

A lengthy colloquy occurred at this point between Mr. Cain and the trial court culminating in an inquiry by the court as to whether or not Mr. Cain had had any facts to support his allegation of a conflict of interest, prior to trial. (R., Vol. III, p. 354). Mr. Cain replied that the information that he had had proved to be erroneous after he heard the evidence of the state but that he had been psychologically strained by representing the three codefendants. (R., Vol. III, p. 355).

The trial court then specifically inquired of Mr. Cain whether or not he knew prior to codefendant Adkins' taking the stand, that Mr. Adkins' statement would be that the Respondent was in Columbus on the day of the robbery. (R., Vol. III, p. 355). Mr. Cain stated,

> "I will gladly so state because that is the truth and I want the record to reflect that I was unaware of that statement, that it would be made and that it had never been discussed with myself as counsel."

(R., Vol. II, p. 355). Following this inquiry, the court denied the motion. (R., Vol. III, p. 356).

Respondent filed a state habeas corpus petition in the Superior Court of Tattnall County alleging that a conflict of interest necessitated separate trial counsel for each defendant. Both Respondent and his codefendant Adkins, testified at the state habeas corpus hearing and the court denied both Petitioners relief on this conflict of interest claim in its order of May 26, 1977. Application to the Supreme Court of Georgia for certificates of probable

to appeal were denied. Respondent then filed his application for federal habeas corpus relief but this application was dismissed without a hearing on February 9, 1978, based on a finding by the district court that the findings of fact and conclusions of law made by the state habeas corpus court were supported by the evidence.

The Fifth Circuit Court of Appeals reviewed Appellant's claim of an alleged conflict of interest which violated his constitutional right, along with his co-defendant, Adkins, but remanded the case to the district court for review in light of the trial transcript. See Brooks v. Hopper, 597 F.2d 57 (1979).

On remand, the district court concluded that any conflict of interest

which may have existed, was not violative of Respondent's constitutional rights. Following oral argument, the Court of Appeals for the Fifth Circuit reversed the decision of the district court, concluding that a conflict of interest arising at trial, operated to make Respondent's trial fundamentally unfair and constitutionally infirm.

A petition for rehearing was filed on behalf of the Petitioner on March 18, 1981, and was denied by the Fifth Circuit Court of Appeals on April 9, 1981. (See Appendix). A motion for a stay of the mandate was granted by the Fifth Circuit on April 21, 1981. (See Appendix).

By means of this petition for writ of certiorari, the Petitioner, Joseph S. Hopper, Warden, by and through counsel,

the Attorney General of Georgia, appeals the decision of the Court of Appeals for the Fifth Circuit which held the following:

> "In a case where the attorney is confronted with a conflict of interest between codefendants prejudice must be presumed and, except under the most extra-ordinary circumstances, the error cannot be considered harmless."

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fifth Circuit applied an improper standard, conflicting with this Court's decision in Cuyler v. Sullivan, 446 U.S. 335 (1980), in determining that Respondent's trial was fundamentally unfair and constitutionally infirm.

Respondent's application for a writ of habeas corpus under 28 U.S.C. § 2254, was denied in the United States District Court for the Middle District of Georgia, Columbus Division. In its order denying Respondent's application for federal habeas corpus relief, the district court, following the instructions of the Court of Appeals for the Fifth Circuit on remand (See Brooks v. Hopper, 597 F.2d 57 (5th Cir. 1979), reconsidered its

earlier ruling denying Respondent's application for habeas corpus, in light of the Respondent's trial transcript. The district court adhered to its earlier ruling, that any conflict of interest which may have occurred during Respondent's trial, did not violate his constitutional rights.

The Respondent appealed from this finding by the district court, reversed the decision of the district court denying habeas corpus relief and remanded the matter for entry of a proper judgment. See Johnson v. Hopper, 639 F.2d 236 (5th Cir. 1981). The Fifth Circuit Court of Appeals held that a conflict of interest on the part of Respondent's attorney, operated to make Respondent's trial fundamentally unfair and constitutionally infirm. Petitioner contends

that this standard enunciated by the Court of Appeals for the Fifth Circuit in Johnson v. Hopper, supra, is an improper standard for judging when a conflict of interest denies a defendant his constitutional rights under the Sixth Amendment. The conclusions of the Court of Appeals for the Fifth Circuit, and the standards utilized by the court to reach these conclusions, ignored the holding of this Court in Cuyler v. Sullivan, 446 U.S. 335 (1980).

In Cuyler v. Sullivan, supra, this Court set forth the standard for establishing a Sixth Amendment violation concerning a defendant who makes no objection at trial as to his attorney representing allegedly conflicting interests. In Cuyler v. Sullivan, supra,

as in the instant case, a state prisoner alleged in a federal habeas corpus proceeding under 28 U.S.C. § 2254, that there had been a violation of his Sixth Amendment right to the effective assistance of counsel because his lawyers had a conflict of interest. Two retained attorneys represented Mr. Sullivan and his two codefendants throughout the state proceeding following Mr. Sullivan's indictment. [1/]

In examining this claim, this Court noted that inherent in the claim were

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[1/] Mr. Johnson and his two codefendants were represented by a court-appointed attorney but this Court rejected in Cuyler v. Sullivan, supra, any distinction, for Sixth Amendment purposes, between appointed and retained counsel, in determining whether defendants had been properly represented.

two issues expressly reserved by the United States Supreme Court in its previous landmark decision in the area of conflict of interest, i.e., Holloway v. Arkansas, 435 U.S. 475 (1978). Holloway v. Arkansas, supra, was the case relied upon by the Court of Appeals for the Fifth Circuit in determining that Respondent's constitutional rights had been violated. See Johnson v. Hopper, 639 F.2d 236, 237 (5th Cir. 1981). The two questions reserved by Holloway and determined in Cuyler v. Sullivan, supra, were whether a state trial judge must inquire into the propriety of multi-representation even though no party lodges an objection, and secondly, whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right

to counsel. Respondent contends that the first question was not an issue in the instant case, as the trial judge did inquire, based on an objection by trial counsel, to the propriety of multiple representation and determined that prior to trial, no basis for severance on the basis of a conflict of interest existed. After the case had been submitted to the jury, the court again inquired of trial counsel as to whether or not any conflict of interest which counsel had anticipated had arisen, and trial counsel specifically stated that the conflict he had anticipated, had not materialized. (R.,Vol. 3, p. 351-356).

The second issue left unresolved in Holloway v. Arkansas, supra, and resolved

by this Court in Cuyler v. Sullivan, did arise in this case and Respondent contends that the holding of this Court was ignored by the Court of Appeals for the Fifth Circuit in determining that a constitutional violation under the Sixth Amendment occurred in Respondent's trial.

In Cuyler v. Sullivan, supra, this Court noted as did the Fifth Circuit in the instant case, that Holloway v. Arkansas, supra, reiterated the principle that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. However, this Court in Cuyler v. Sullivan, supra, went further to articulate what type of conflict of interest must be shown in order for multiple representation

to violate the Sixth Amendment. This Court stated that a defendant who makes no objection at his trial as to his attorney representing allegedly conflicting interests, must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. This Court stressed that unless a defendant shows that his counsel actively represented conflicting interests, he has not established a constitutional predicate for his claim of ineffective assistance.

In contrast to the decision of the Court of Appeals for the Fifth Circuit, in which the court concluded that when an attorney is confronted with a conflict of interest between codefendants, "prejudice must be presumed," this Court stated:

> "Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflict impermissibly imperiled his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for a conflict has resulted in ineffective assistance of counsel. . . (cites omitted)."

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 1718 (1980).

This Court went on to further enunciate the standard for establishing a violation of the Sixth Amendment due to a conflict of interest by stating the applicable standard as follows:

> "In order to establish a violation of the Sixth

> Amendment, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 1718 (1980).

The Court of Appeals for the Fifth Circuit cited the decision of this Court in Glasser v. United States, 315 U.S. 60 (1942), for the proposition that prejudice need not be proven when there is an actual conflict of interest. This Court in Cuyler v. Sullivan, supra, also made reference to its earlier decision in Glasser v. United States, supra, but having recognized that Glasser

stood for the proposition that unconstitutional multiple representation is never harmless error, this Court went further and stated:

> "Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, at 487-491, 55 L.Ed.2d 426, 98 S.Ct. 1173. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See Glasser, supra, at 72-75, 86 L.Ed. 680, 62 S.Ct. 457."

(emphasis supplied). Cuyler v. Sullivan, 100 S.Ct. 1708, 1719 (1980). This was not the standard applied by the Court of Appeals for the Fifth Circuit which stated that:

> "In a case when the attorney is confronted with a conflict of interest between co-defendants prejudice must be presumed and except under the most extraordinary circumstances, the error cannot be considered harmless."

Johnson v. Hopper, 639 F.2d 236, 239 (5th Cir. 1981). Under Cuyler v. Sullivan, there is no presumption of prejudice, but rather, it must be shown that counsel actively represented conflicting interests. The Court of Appeals for the Fifth Circuit did not find that Respondent's attorney actively represented conflicting interests, but rather, focused on what it termed Respondent's attorney's "inability to function in a conflict-free atmosphere." Id. at 238. The Court of Appeals for the Fifth Circuit focused on no actions by the Respondent's

attorney showing that he actively represented conflicting interests among the three codefendants.

Petitioner contends that this Court's decision in Cuyler v. Sullivan, supra, overruled the numerous previous decisions of the Court of Appeals for the Fifth Circuit concluding that you do not have to show prejudice, if you can show an actual conflict of interest. See Stevens v. United States, 595 F.2d 1066 (5th Cir. 1978)(conflict found where defense counsel concurrently represented the principal witness against the defendant). Instead, this Court stated that you not only have to show an actual conflict of interest, but additionally, must show that the conflict adversely affected an attorney's performance so

that the counsel actively represented conflicting interest. It is not enough to show an actual conflict and therefore, presume prejudice, as did the Court of Appeals for the Fifth Circuit in the instant case.[2/]

Assuming for the sake of argument, that an actual conflict of interest had been identified by the Court of Appeals

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[2/] Petitioner contends that this case is distinguishable from previous Fifth Circuit cases in which actual conflicts of interest have been found to exist such as United States v. Mahar, 550 F.2d 1005 (5th Cir. 1977) (conflict found where retained counsel, representing two co-defendants, one of whom had decided to plead guilty and testify against the other); and Zuck v. State of Alabama, 588 F.2d 436 (5th Cir. 1979) (conflict found where retained law firm representing defendant in a murder trial, also represented state prosecutor in unrelated civil matter).

for the Fifth Circuit, in light of the strong evidence of Respondent's guilt produced at his trial, it cannot be said that any conflicting testimony of codefendant Adkins, actually affected the adequacy of Mr. Cain's representation, nor has the Respondent shown that his counsel actively represented a conflicting interst by any of his actions throughout the trial. It is the Petitioner's position that a constitutional violation under the standard of Cuyler v. Sullivan, supra, has not been demonstrated by the Respondent and that the Court of Appeals for the Fifth Circuit ignored the decison of this Court in Cuyler v. Sullivan, supra, in determining that a Sixth Amendment violation due to an alleged conflict of interest had occurred.

CONCLUSION

Because the Court of Appeals for the Fifth Circuit "presumed prejudice" from what it conceived to be counsel's inability to function in a conflict-free atmosphere, instead of applying the standard of this Court set forth in Cuyler v. Sullivan, 446 U.S. 335 (1980), a petition for a writ of certiorari should be granted to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(signatures
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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Petition for Writ of Certiorari upon the Respondent by depositing same in the United States mail, with sufficient, first class postage affixed thereto, and addressed to counsel for Respondent as follows:

Mr. Howard J. Manchel
Attorney for Respondent
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This 24th day of June, 1981.

Susan V. Boleyn
SUSAN V. BOLEYN

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Jerry Leon BROOKS, a/k/a James Andrew Johnson,
Petitioner-Appellant,

v.

Joe S. HOPPER, Warden, et al.,
Respondents-Appellees.

James Louis ADKINS,
Plaintiff-Appellant

v.

Joe S. HOPPER, Warden, Georgia State Prison,
Defendant-Appellee.

Nos. 78-1809, 78-2284.

United States Court of Appeals
Fifth Circuit.

June 13, 1979.

Appeals from the United States District Court for the Middle District of Georgia.

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

TJOFLAT, Circuit Judge:

This is a consolidated appeal from the district court's denial of habeas corpus relief to two prisoners of the state of Georgia, James L. Adkins and Jerry Leon Brooks. Adkins and Brooks petitioned for relief pursuant to 28 U.S.C. § 2254 (1976) following the denial of their constitutional claims in state habeas corpus proceedings. For the reasons set forth below, we vacate and remand to the district court with the direction that it accord Adkins and Brooks a full evidentiary hearing for their claims.

On May 24, 1975, the V.V. Vick Jewelry Store in Columbus, Georgia, was robbed by three men. On January 27, 1976, Adkins, Brooks and Walter H.

Springer were indicted by the grand jury of Muscogee County, Georgia, and charged with five counts of armed robbery. They were arraigned on May 24, 1976. After a jury trial in the Superior Court of Muscogee County on June 2, 1976, the three were convicted on all five counts and sentenced to serve five consecutive life sentences in the Georgia State Penitentiary. No appeal was taken from these convictions.

Adkins, Brooks, and Springer were represented by one court appointed attorney, William S. Cain, at their trial. Prior to trial, Cain informed the trial court that a conflict of interest had apparently developed between the defendants and requested that separate attorneys

be appointed for each. The court asked Cain to explain why he felt a conflict existed, but Cain refused to do so because of the attorney-client privilege. The court consequently denied the request for separate counsel.

At trial each defendant testified in his own behalf; each denied his guilt and stated that he was in Atlanta on the day of the robbery. Adkins was the last defendant to testify, and on cross-examination made several statements, which we shall discuss below, that form the basis for this appeal.

Following their convictions and subsequent incarceration, both Adkins and Brooks filed in the Superior Court of Tattnall County (the county where they

were incarcerated) pro se petitions for habeas cropus alleging numerous constitutional bases for relief. One alleged ground for relief was a conflict of interest necessitating separate trial counsel for each defendant. The petitions were consolidated for hearing before a judge other than the one who presided at trial. At the hearing, which took place on November 29, 1976, and January 26, 1977, both Adkins and Brooks, who appeared without counsel, were asked to explain how their attorney had been placed in a conflict of interest at trial. Their response was merely that Adkins had testified that Brooks telephoned him from Columbus on the day of the robbery. Although the testimony tended to discredit Brooks, who claimed that he was

in Atlanta on that day, the habeas court viewed it as a mere "conflict of testimony" and, on May 26, 1977, denied both parties relief on the conflict of interest claim (as well as the other grounds asserted in their petitions). Petitioners' subsequent applications to the Georgia Supreme Court for certificates of probable cause to appeal this disposition were denied.

Up to this point, Adkins and Brooks, who were without counsel at all times from their original convictions until after this appeal was lodged, had made only vague and conclusory explanations of why a conflict of interest existed at their trial. In their pro se applications for federal habeas corpus relief here on review, however, both have stated that

one co-defendant had accused another co-defendant of committing the May 24, 1975, robbery. The district court, on February 9, 1978, dismissed these applications without a hearing; the court concluded that the record of the evidentiary hearing accorded Adkins and Brooks in the Superior Court of Tattnall County failed to disclose a constitutional violation. It found that "the findings of fact and the conclusions reached by the state habeas corpus court are fully supported by the evidence and . . . should not be disturbed." Adkins Record at 115; Brooks Record at 118. The district court, like the Tattnall County Superior Court, did not have before it a transcript of the petitioners' trial in the Muscogee County Superior Court.

Following the commencement of this appeal, counsel was appointed for both petitioners. Though the trial transcript is not in the record before us, Brooks's attorney quoted from a portion of it in his brief. This quotation is from Adkins's testimony on cross-examination by the state prosecutor. In that testimony Adkins revealed that Brooks telephoned him on the day of the robbery stating that he was then in Phenix City, Alabama (which is adjacent to Columbus, Georgia), and that "he [Brooks] had robbed V.V. Vick Jewelry and the police got the [getaway] car and he needed some help and wanted me to come pick him up." Supplemental Brief for Appellant Brooks at 11. Thus, Adkins directly accused his co-defendant of having

admitted commission of the very robbery in question. If defense counsel had not previously been placed in a conflict of interest, this development by the prosecutor's cross-examination (a tact he was entitled to take) surely created one.

Neither the record on appeal nor the briefs disclose what transpired immediately following Adkins' revelation; we do not know, for example, whether defense counsel renewed his motion for separate counsel or moved for a mistrial (since the appointment of new counsel during the presentation of the defendants' cases would doubtless have been too late). We do know, from counsels' undisputed representations at oral argument, that Adkins made two other statements, presumably on cross-examination,

indicating that (1) Brooks had lied when asked how long he had known Adkins, and (2) Brooks had burglarized Adkins's apartment prior to the robbery and thus obtained Adkins's notebook, which was discovered in the getaway car. We were also advised by counsel at oral argument that defense counsel made no attempt to challenge Adkins's incriminating testimony; that he refused to permit Brooks to retake the stand in rebuttal; and that he waived closing argument to the jury as to all defendants. Finally, defense counsel stood silent at sentencing.

[1] Petitioners contends that the actions of defense counsel after Adkins incriminated Brooks on cross-examination were the product of counsel's insurmountable conflict of interest and

operated to deny them the fair trial and effective assistance of counsel guaranteed by the constitution. Petitioners also contend that the merits of the constitutional claims are not to be measured by the sufficiency of defense counsel's pretrial motion for the appointment of separate counsel on conflict of interest grounds, a motion that may have been inadequate. They submit, and we agree, that a trial judge, faced with defense counsel in Mr. Cain's dilemma in the midst of the defenses' case, has a duty at least to make inquiry whether counsel is able to proceed further without substantially impairing the right of one of his clients to a full defense and a fair trial. This duty would seem to devolve upon a trial judge where, for example, it is

apparent that the conflict of interest may preclude defense counsel from moving for a mistrial, it being to the strategic advantage of one of his clients to continue on but in the best interest of the other to abort the trial.

[2] We therefore conclude that there is substantial merit in petitioners' constitutional claims stemming from their attorney's conflict of interest. See Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Stephens v. United States, ___F.2d___, slip op. 5137 (5th Cir. 1979); United States v. Medel, 592 F.2d 1305, 1309-13 (5th Cir. 1979); United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978). The transcript of the original trial is crucial, of course, for a proper evaluation of

these claims, since any decision must necessarily turn upon the events at trial. The district court has not considered the constitutional implications of the conflict of interest now articulated. Accordingly, we vacate its order denying the petitioners relief and remand the case for further proceedings consistent with this opinion.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JERRY LEON BROOKS, a/k/a JAMES ANDREW JOHNSON,	)	CIVIL ACTION NO. 78-1-COL
Petitioner,	)	
v.	)	
JOSEPH S. HOPPER, WARDEN, GEORGIA STATE PRISON,	)	
Respondent	)	

MEMORANDUM AND ORDER

The Court of Appeals for the Fifth Circuit remanded this habeas corpus matter to this Court for further consideration of the possible constitutional implications of the conflict of interest occurring during Petitioner's state court trial. Pursuant to this remand the Court has conducted a further hearing

with regard to the matter and the trial transcript of the original trial has been made available to the Court for review. The transcript of habeas corpus proceedings which were conducted in the state court has also been made available to this Court.

The transcript of the trial which resulted in Petitioner's conviction shows that the conflict of interest which arose at the trial as the result of the testimony of the Co-Defendant Adkins was not the conflict of interest which was contemplated by the trial attorney, Mr. Cain, in his pre-trial motion for

the appointment of separate counsel based upon his fear of a conflict of interest.

The trial court Judge questioned Mr. Cain extensively concerning the nature of the conflict of interest which he anticipated. The trial court Judge specifically asked:

> "Are you stating in your place that also, prior to the defendant Atkins taking the stand and stating that defendant Brooks had not told the truth on the witness stand, was in Columbus, that you had no knowledge that he intended to do that prior to the time?
>
> Mr. Cain: I will gladly so state because that is the truth and I want the record to reflect that I was unaware of that statement, that it would be made and it had never been discussed with myself as counsel." (Trial transcript, p. 355).

This statement which was made by Mr. Cain to the trial court Judge is consistent with the testimony of Mr. Adkins during cross-examination. During cross-examination Mr. Adkins stated that the Petitioner Brooks called him in Atlanta from Phenix City, Alabama. Mr. Adkins was then asked when was the first occasion when he had related that the Petitioner Brooks called him in Atlanta from Phenix City and Mr. Adkins replied, "This is the first time that it has been asked me." (T. 303-304). Thus, based on the colloquy above quoted between Mr. Cain and the trial court Judge and the cross-examination of Mr. Adkins, it is apparent that this testimony by Mr. Adkins concerning receiving a telephone call from

the Petitioner in Phenix City was surprise testimony and was not the basis upon which Mr. Cain sought to have separate counsel appointed for the Petitioner or one of his Co-Defendants prior to trial.

The trial court judge also noted that Mr. Cain stated that at the time he made his motion he had no facts upon which to base his suggested conflict of interest, but simply stated that this conflict of interest was a supposition on his part, Mr. Cain having previously stated to the Court that having to represent three defendants had created a psychological strain on him as counsel. (T. 355 and 356).

It is also apparent from the trial transcript that the trial court Judge was well aware of the Court's duty to assure that each of the Co-Defendants had proper representation, and in that connection the Judge stated that "Each of these Defendants could have hired themselves a separate lawyer. They are not entitled to perfection in representation. They are entitled to adequate and competent representation." (T. 354). This statement by the trial court appears to be in line with the standards of representation of multiple defendants as set forth in such cases as Baker v. Wainwright, 422 F.2d 145 (5 Cir. 1970), and Holloway v. Arkansas, 435 U.S. 475 (1978).

As has been above mentioned, the transcript of the state habeas corpus hearing is before this Court and certain testimony given on that occasion indicates that Mr. Adkins in his surprise testimony during the course of the trial in which Mr. Brooks was co-Defendant was not attempting to blame the crime on Petitioner and thus exculpate himself. During the course of that hearing both Brooks and his Co-Defendant Adkins testified and each of them made it clear that it was not their intention to blame the other with the alleged crime (Transcript of January 26, 1977 habeas corpus hearing, pp. 6 and 7).

The evidence in the state trial court overwhelmingly supported the conviction of the Petitioner.

Having reviewed the matter further as directed by the Court of Appeals, this Court adheres to its earlier ruling, concluding that any conflict of interest which may have occurred during the trial of Petitioner's case did not violate the constitutional rights of Petitioner.

This 2nd day of November, 1979.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JERRY LEON BROOKS, a/k/a JAMES ANDREW JOHNSON, Petitioner	)	CIVIL ACTION NO. 78-1-COL.
vs.	)	
JOSEPH S. HOPPER, WARDEN, GEORGIA STATE PRISON, Respondent	)	

J U D G M E N T

Pursuant the Memorandum and Order of Court filed November 2, 1979, and for the reasons stated therein and having reviewed the matter further as directed by the Court of Appeals, this Court adheres to its earlier ruling, concluding that any conflict of interest which may have occured during the trial of Petitioner's case did not violate

the constitutional rights of Petitioner.

Judgment is therefore entered in favor of the Respondent.

At Columbus, Georgia this 2nd day of November, 1979.

WALTER F. DOYLE, CLERK

By Jonnie L. Adams /s/

Jonnie L. Adams, Deputy Clerk

I certify that I have this date mailed a copy thereof to all counsel of record and petitioner.

This 2nd day of November, 1979.

Jonnie L. Adams /s/

Deputy Clerk

James Andrew JOHNSON, a/k/a Jerry Leon Brooks, Petitioner-Appellant,

v.

Joseph S. HOPPER, Warden, et al., Respondents-Appellees.

No. 79-3804.

United States Court of Appeals
Fifth Circuit.

March 12, 1981.

Appeal from the United States District Court for the Middle District of Georgia.

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

We review on appeal after remand the application of James Andrew Johnson for habeas corpus relief pursuant to 28 U.S.C. § 2254. Johnson a/k/a Jerry Leon Brooks,

first petitioned pro se for habeas relief in 1978, alleging, inter alia, that his court appointed counsel, who was also appointed to represent Johnson's two co-defendants in a joint trial, was laboring under an impermissible conflict. The district court dismissed the petition finding that it was based on only vague and conclusory allegations. We reversed and remanded for an evidentiary hearing, Brooks v. Hopper, 597 F.2d 57 (5th Cir. 1979). On remand the district court concluded that any conflict of interest which may have existed did not violate petitioners' constitutional rights. Considering this matter controlled by the opinion of the Supreme Court in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), we reverse, order issuance of the writ of habeas corpus and remand to

the district court for entry of an appropriate judgment.

Johnson, James Lewis Adkins and Walter H. Springer were indicted on five counts of armed robbery. The court appointed one attorney, William S. Cain, to represent all three defendants in a joint trial before the Georgia state court. Cain moved pre-trial for the appointment of separate counsel, expressing a concern that he could not properly represent any defendant because of the obligation to represent all three. The court asked Cain to explicate his reasons for believing a conflict existed. Cain declined on the grounds that to do so would constitute a violation of the attorney-client relationship. The court denied the request.

The joint indictment was based on charges that the three defendants had robbed the V.V. Vick Jewelry Store in Columbus, Georgia. All three testified, denied involvement and claimed to be in Atlanta on the day of the robbery. Johnson and Springer, who testified before Adkins, said they had never been to Vick's Jewelers and did not know each other at the time of the robbery. Adkins, testifying last, made several statements on cross-examination which tended to exculpate him and dramatically inculpated Johnson. Specifically, Adkins testified that on the day of the robbery Johnson telephoned him from Phenix City, Alabama (sister city to Columbus, Georgia) and said that "he [Johnson] had robbed V.V. Vick Jewelry and the police got the [getaway] car and he needed some help

and wanted me [Adkins] to come pick him up." Prior to hearing it from the stand, Cain did not know that Adkins would directly accuse Johnson in this manner.

At this point Cain's vague concerns of being confronted with a situation in which representation of one client would occasion compromise of the position of another came to explosive fruition. The conflict was so severe it should have been obvious to everyone. In support of Johnson's earlier denial of involvement one would expect Johnson's counsel to endeavor to impeach or at least challenge Adkins' credibility. As Adkins' counsel, Cain was not free to do anything which might prejudice Adkins' defense. Any comment upon Adkins' testimony, either

to bolster or lessen its effect, would cause Cain to breach his obligation to one client or the other. As a consequence, Cain did not examine Adkins on re-direct or recall Johnson to rebut. In fact he offered no evidence on the subject.

After the jury retired, Cain renewed his motion for the appointment of separate counsel. In his argument on the motion Cain informed the court that the pre-trial motion for separate counsel had not been based on knowledge that Adkins would testify as he did but on certain other concerns which did not materialize. The motion was again denied. The three defendants were convicted on all five counts and sentenced to five consecutive life sentences. There was no direct

appeal. State habeas relief was denied.

In denying the § 2254 application the district judge reasoned that since Cain had no prior knowledge that Adkins intended to implicate Brooks, no actual conflict existed. This fails to give proper consideration to the professionally impossible position in which Cain was placed from the moment Adkins testified about Johnson's involvement in the crime. Additionally, the district judge construed testimony by Adkins and Johnson at the state habeas proceeding to mean that Adkins did not intend to implicate Johnson in his surprise trial testimony. Our review of the record compels a contrary conclusion. Regardless, we question the relevance of Adkins' intentions.

As we stated at the outset, this matter is controlled by the Supreme Court's disposition in Holloway v. Arkansas, supra. In Holloway one attorney was appointed to represent three defendants. He requested, before trial, that separate counsel be appointed, raising the spectre of conflict if one attorney tried to represent all three. When he learned that all defendants might testify, the attorney in Holloway resubmitted his motion on the ground that he would not be able to properly examine his clients for fear he might intrude upon the attorney-client privilege. The motion was again denied and the defendants were ultimately found guilty. The Supreme Court reversed their convictions, holding that the failure of the trial court to appoint

separate counsel deprived the defendants of their Sixth Amendment guarantee of the effective assistance of counsel.

[1] In the case sub judice the district court placed too great an emphasis on Cain's inability to make an accurate pre-trial prediction of the exact problems that would arise. Cain's pre-trial motion, merely stating that separate counsel would be necessary to avoid a conflict, is quite similar to the motion in Holloway which was found to be sufficient to apprise the trial court of potential conflict. We have applied the rationale of Holloway in a situation where no request for separate counsel was made, concluding that ineffective representation by a lawyer laboring under a conflict of interest

renders the trial fundamentally unfair whether the judge knew of the conflict or not. Stephens v. United States, 595 F.2d 1066 (5th Cir. 1979). Unlike most Fourteenth Amendment due process cases, no state action in the form of a state official's knowledge of the wrongdoing need be shown. A deprivation of due process results when the judgment reached in such a trial is enforced. Zuck v. State of Alabama, 588 F.2d 436 (5th Cir. 1979).

[2-4] The mere fact that one lawyer represents more than one co-defendant does not automatically establish a conflict of interest. Holloway, 435 U.S. at 482, 98 S.Ct. at 1177; United States v. Risi, 603 F.2d 1193 (5th Cir. 1979). Further, an actual rather than a speculative conflict of interest must be shown

before the constitutional guarantee of effective assistance of counsel is implicated. Zuck, supra, 588 F.2d at 439; United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1973). The constitutional implication occurs when a defense attorney is placed in a situation "inherently conducive to divided loyalties." Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974). We believe that Cain was clearly placed in such a situation. Cain was put in an untenable professional position when the court appointed him to represent all three defendants despite the apparent potential for conflict. The court should have extricated him from this position upon his initial request. The representations of an attorney, as an officer of the court, that he perceives

a potential conflict should be given very serious consideration. Holloway, 435 U.S. at 486, 98 S.Ct. at 1179. The state district judge's failure to grant that first motion, pre-Holloway, is understandable. The denial of the renewed motion, after Adkins' surprise testimony inculpating Johnson, is not so easily understood. An injustice was done to Cain and the constitutional right to effective assistance of counsel was denied Johnson.

We need not inquire into the specific prejudice suffered by Johnson as a result of his lawyer's unavoidable divided loyalties, not should we speculate on whether he would have been convicted regardless. Cain's inability to function in a conflict-free atmosphere violated

Johnson's constitutional right to the assistance of counsel, a right so basic to a fair trial that its infraction cannot be treated as harmless error. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The fact that Cain was present during the entire trial proceeding is of no moment. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." Holloway, supra, 435 U.S. at 490, 98 S.Ct. at 1181. For this reason, the Court held in Holloway that when an actual conflict exists prejudice need not be proven, reversal is automatic. As the Supreme Court said in the landmark case, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942):

To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. Snyder v. Massachusetts, 291 U.S. 97, 116 [54 S.Ct. 330, 336, 78 L.Ed. 674]; Tumey v. Ohio, 273 U.S. 510, 535 [47 S.Ct. 437, 445, 71 L.Ed. 749]; Patton v. United States, 281 U.S. 276, 292 [50 S.Ct. 253, 256, 74 L.Ed. 854]. And see McCandless v. United States, 298 U.S. 342, 347 [56 S.Ct. 764, 766, 80 L.Ed. 1205].

315 U.S. at 75-76, 62 S.Ct. at 467.

The reason behind the dispensation of the requirement of proving prejudice should become apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone. In Risi v. State of Alabama, 588 F.2d 436 (5th Cir. 1979), we decried the inadequacy of a trial transcript when one seeks to assess a lawyer's trial performance for subtle variations in demeanor and lack of vigor and depth of cross-examination cannot be truly reflected in the pages of a transcript.

In a case when the attorney is confronted with a conflict of interest between co-defendants prejudice must be

presumed and, except under the most extraordinary circumstances, the error cannot be considered harmless.

We conclude that Cain's conflict of interest operated to make Johnson's trial fundamentally unfair and constitutionally infirm. The decision of the district court denying habeas corpus relief is reversed; habeas relief is to be appropriately granted. The matter is remanded for entry of a proper judgment.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

NO. 79-3804

D.C. Docket No. CA 78-1-COL.

JAMES ANDREW JOHNSON,
a/k/a JERRY LEON BROOKS,

Petitioner-Appellant

versus

JOSEPH S. HOPPER, Warden,
ET AL.,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the

United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court.

March 12, 1981

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-3804

JAMES ANDREW JOHNSON, a/k/a
JERRY LEON BROOKS,

Petitioner-Appellant,

versus

JOSEPH S. HOPPER, WARDEN,
ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 12, 1981)

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

HENRY A. POLITZ /s/
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 79-3804

JAMES ANDREW JOHNSON, a/k/a
JERRY LEON BROOKS,

Petitioner-Appellant,

versus

JOSEPH S. HOPPER, WARDEN,
ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

---

ORDER:

(x) The motion of Appellees for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 6 July 1981, the stay

to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

HENRY A. POLITZ /s/
UNITED STATES CIRCUIT JUDGE

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No. 81-60

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH S. HOPPER,
WARDEN,

Petitioner,

v.

JAMES ANDREW JOHNSON,
A/K/A JERRY LEON BROOKS,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Howard J. Manchel
Counsel of Record

Please serve:

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QUESTIONS PRESENTED

Respondent-Appellee has considered the Petitioner's question and can find no relevance it might have to the facts in the case for which its seeks the writ. The Fifth Circuit, in light of the facts of the case, properly did not consider the holding of Cuyler v. Sullivan, 446 U.S. 335 (1980).

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OPINION BELOW

The published opinion of the Court of Appeals for the Fifth Circuit is reported as Johnson v. Hopper, 639 F.2d 236 (5th Cir. 1981). A copy of the opinion is also attached as Appendix "A" to this brief. An earlier opinion of the United States Court of Appeals for the Fifth Circuit remanding the case for an evidentiary hearing, is reported as Brooks v. Hopper, 597 F.2d 57 (5th Cir. 1979). A copy of this order is attached to the State's Petition for Certiorari, Appendix, page 1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 12, 1981. See Johnson v. Hopper, 639 F.2d 239 (5th Cir. 1981). A timely petition for rehearing en banc was denied on April 9, 1981. (A copy of this denial is contained in the Appendix of the State's Petition). The Court of Appeals for the Fifth Circuit granted the Petitioner's motion for a stay of the issuance of the mandate pending this petition for writ of certiorari on April 21, 1981. The petition for a writ of certiorari was filed within the allowable ninety days of the judgment of the Court of Appeals for the Fifth Circuit. This Court's jurisdiction was invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF FACTS

On May 24, 1975, the V. V. Vick Jewelry Store in Columbus, Georgia, was robbed by three men. On January 27, 1976, respondent-Appellee, (James Andrew Johnson a/k/a Jerry Leon Brooks), James L. Adkins and Walter H. Springer were indicted and charged with five counts of armed robbery. Their arraignment was on May 24, 1976, and nine days later were tried before a jury in the Superior Court of Muscogee County. The three men were convicted on all five counts and Respondent-Johnson was sentenced to serve five consecutive life sentences in the Georgia State Penitentiary. No appeal was taken from these convictions.

Adkins, Springer and Respondent-Johnson were represented by one court appointed attorney, William S. Cain, a practicing attorney for over 20 years, at their trial. Prior to trial, on two separate occasions, Cain moved for the appointment of separate counsel on the grounds that a conflict of interest had arisen among the defendants. The trial judge asked Cain to explain why he felt a conflict existed, but Cain refused to do so because of the attorney-client privilege. The Court denied the request for separate counsel.

During the trial, each defendant testified on his own behalf; each denied his guilt and stated he was in Atlanta on the day of the robbery. Adkins was the last defendant to testify, and on cross-examination made statements that Respondent-Johnson telephoned him on the day of the robbery stating he was in Phenix City, Alabama, (which is adjacent to Columbus, Georgia), that he (James Johnson) had robbed V. V. Vick Jewelry and the police had his car and therefore he wanted me (Adkins) to pick him up. (R-303). Thus, Adkins directly accused his co-defendant of having admitted commission of the robbery in question. Also while on the stand Adkins stated the Respondent-Johnson had lied when asked how long he had known Adkins (R-301) and that Adkins' apartment was broken into and a notebook had been taken prior to the robbery; this notebook was discovered in the getaway car allegedly owned by James A. Johnson, Respondent.

Counsel for James A. Johnson made no effort to challenge Adkins' incriminating testimony. Respondent-Johnson's counsel refused to permit him to take the witness stand in rebuttal and waived closing argument to the jury as to all defendants. Even at sentencing defendant's counsel remained silent. The conviction was not appealed.

State habeas relief was denied. Respondent-Appellee filed a §2254 petition which was twice rejected by the district court on the grounds that since Attorney Cain had no prior knowledge that Adkins intended to implicate Respondent Johnson, no actual conflict existed. The case was appealed and the Fifth Circuit in Johnson v. Hopper, 639 F.2d 236, reversed after being presented the trial transcript.

REASONS FOR DENYING THE WRIT

1. The Court below fully considered and correctly decided the issue.

This case came before the Fifth Circuit on two separate occasions. The first time Johnson a/k/a Jerry L. Brooks petitioned pro se for habeas relief alleging that his court appointed attorney labored under an impermissible conflict because he had to represent two defendants who had conflicting defenses. The district court, without the benefit of the trial transcript, had dismissed the petition finding that it was based on only vague and conclusory allegations. Johnson appealed to the Fifth Circuit and counsel was appointed to represent him. Based on his attorney's uncontradicted assertions in his supplemental brief a panel consisting of Judges Tuttle, Tjoflat and Hill reversed and remanded to the district court, concluding that Johnson's claim that his attorney was laboring under a conflict of interest had substantial merit and cited Holloway v. Arkansas 435 U.S. 475, 98 S. Ct. 1173, 55 L Ed 2d 426 (1978) as controlling. However, they felt a transcript of the original trial was necessary for a proper and complete evaluation of the claims, and directed the district court to consider the constitutional implications of the conflict of interest articulated.

District Judge Elliot again failed to see any constitutional implications in Respondent-Appellee's denial of the right to cross-examine a co-defendant who accused him of admitting the crime in question, because they shared against their will, the same court appointed attorney. Respondent-Appellee again appealed to the Fifth Circuit and a second panel consisting of Judges Henderson, Politz and Williams again reversed and remanded to the District Court. This time, however, they had the benefit of and relied on the trial transcript. The opinion speaks for itself and clearly shows the appellate court fully considered the issue.

2. Petitioner's Argument for seeking the Writ for Certiorari is without merit because the Court's prior decisions are controlling.

Petitioner attempts to establish the holding of Cuyler v. Sullivan 446 U.S. 335 as controlling in this case. In Cuyler this Court set forth the standard for establishing a Sixth Amendment violation concerning a defendant who makes no objection at trial as to his atttorney representing allegedly conflicting interests. In the case at bar it is clear that Respondent-Johnson moved pre-trial for the appointment of separate counsel and renewed his motion after the jury retired. This single fact places this case on all fours with Holloway v. Arkansas, supra. Moreover, Petitioner appears to be arguing in a vacuum when it infers that Respondent can show no actual conflict of interest which adversely affected his attorney's performance, and they mistate the law when they argue he must show prejudice. No greater conflict could exist in our adversary system than a defendant's lawyer being unable to cross-examine his client's accusor because he also represents the accusor. For this factual reason the Fifth Circuit did not apply the holding of Cuyler v. Sullivan. In Cuyler there was no blatant conflict of interest by an attorney and therefore the holdings of Cuyler as espoused by petitioner are not controlling the case at bar.

In summary, the Respondent-Johnson urges this Court to deny the writ. Johnson has already convinced the Fifth Circuit twice that he has been denied his constitutional right to counsel and confront witnesses against him. Petitioner would have this Court make further inquiries into the obvious. The transcript is not muddled. Clearly, Respondent-Appellee showed in the District Court and before the Fifth Circuit that his counsel, against his own professional judgment, was forced to actively represent conflicting interests, and for this reason, Cuyler and the test the State would apply to the defendants does not apply.

Respectfully submitted,

Howard J. Manchel

James Andrew JOHNSON, a/k/a Jerry Leon Brooks, Petitioner-Appellant,

v.

Joseph S. HOPPER, Warden, et al., Respondents-Appellees.

No. 79-3804.

United States Court of Appeals, Fifth Circuit.

March 12, 1981.

Following remand in habeas corpus proceeding, 597 F.2d 57, the United States District Court for the Middle District of Georgia, J. Robert Elliott, Chief Judge, denied petition, and petitioner appealed. The Court of Appeals, Politz, Circuit Judge, held that petitioner was deprived of effective assistance of counsel as a result of his attorney's joint representation of three defendants at state criminal trial, since testimony of petitioner's codefendant tended to exculpate the codefendant and dramatically inculpated the petitioner; counsel's inability to function in conflict-free atmosphere violated petitioner's constitutional right to assistance of counsel, and the infraction of that right could not be treated as harmless error.

Reversed and remanded.

1. Constitutional Law ⇐254(2)

In the case of conflict of interest arising out of representation of more than one criminal defendant, no state action in the form of a state official's knowledge of the wrongdoing need be shown; a deprivation of due process results when judgment reached in such trial is enforced. U.S.C.A.Const. Amends. 6, 14.

2. Criminal Law ⇐641.5

Mere fact that one lawyer represents more than one codefendant does not automatically establish a conflict of interest. U.S.C.A.Const. Amends. 6, 14.

3. Criminal Law ⇐641.5

An actual rather than speculative conflict of interest must be shown before constitutional guarantee of effective assistance of counsel is implicated; the constitutional implication occurs when defense attorney is placed in a situation inherently conducive to divided loyalties. U.S.C.A.Const. Amends. 6, 14.

4. Criminal Law ⇐641.5, 1166.11

Petitioner was deprived of effective assistance of counsel as a result of his attorney's joint representation of three defendants at state criminal trial, since testimony of petitioner's codefendant tended to exculpate the codefendant and dramatically inculpated the petitioner; counsel's inability to function in conflict-free atmosphere violated petitioner's constitutional right to assistance of counsel, and the infraction of that right could not be treated as harmless error. U.S.C.A. Const. Amends. 6, 14.

Appeal from the United States District Court for the Middle District of Georgia.

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

We review on appeal after remand the application of James Andrew Johnson for habeas corpus relief pursuant to 28

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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court

U.S.C. § 2254. Johnson a/k/a Jerry Leon Brooks, first petitioned *pro se* for habeas relief in 1978 alleging, *inter alia*, that his court appointed counsel, who was also appointed to represent Johnson's two co-defendants in a joint trial, was laboring under an impermissible conflict. The district court dismissed the petition finding that it was based on only vague and conclusory allegations. We reversed and remanded for an evidentiary hearing. *Brooks v. Hopper*, 597 F.2d 57 (5th Cir. 1979). On remand the district court concluded that any conflict of interest which may have existed did not violate petitioners' constitutional rights. Considering this matter controlled by the opinion of the Supreme Court in *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), we reverse, order issuance of the writ of habeas corpus and remand to the district court for entry of an appropriate judgment.

Johnson, James Lewis Adkins and Walter H. Springer were indicted on five counts of armed robbery. The court appointed one attorney, William S. Cain, to represent all three defendants in a joint trial before the Georgia state court. Cain moved pre-trial for the appointment of separate counsel, expressing a concern that he could not properly represent any defendant because of the obligation to represent all three. The court asked Cain to explicate his reasons for believing a conflict existed. Cain declined on the grounds that to do so would constitute a violation of the attorney-client relationship. The court denied the request.

The joint indictment was based on charges that the three defendants had robbed the V. V. Vick Jewelry Store in Columbus, Georgia. All three testified, denied involvement and claimed to be in Atlanta on the day of the robbery. Johnson and Springer, who testified before Adkins, said they had never been to Vick's Jewelers and did not know each other at the time of the robbery. Adkins, testifying last, made several statements on cross-examination which tended to exculpate him and dramatically inculpated Johnson. Specifically, Adkins testified that on the day of the robbery Johnson telephoned him from Phenix City, Alabama (sister city to Columbus, Georgia) and said that "he [Johnson] had robbed V. V. Vick Jewelry and the police got the [getaway] car and he needed some help and wanted me [Adkins] to come pick him up." Prior to hearing it from the stand, Cain did not know that Adkins would directly accuse Johnson in this manner.

At this point Cain's vague concerns of being confronted with a situation in which representation of one client would occasion compromise of the position of another came to explosive fruition. The conflict was so severe it should have been obvious to everyone. In support of Johnson's earlier denial of involvement one would expect Johnson's counsel to endeavor to impeach or at least challenge Adkins' credibility. As Adkins' counsel, Cain was not free to do anything which might prejudice Adkins' defense. Any comment upon Adkins' testimony, either to bolster or lessen its effect, would cause Cain to breach his obligation to one client or the other. As a consequence, Cain did not examine Adkins on re-direct or recall Johnson to rebut. In fact he offered no evidence on the subject.

After the jury retired, Cain renewed his motion for the appointment of separate counsel. In his argument on the motion Cain informed the court that the pre-trial motion for separate counsel had not been based on knowledge that Adkins would testify as he did but on certain

other concerns which did not materialize. The motion was again denied. The three defendants were convicted on all five counts and sentenced to five consecutive life sentences. There was no direct appeal. State habeas relief was denied.

In denying the § 2254 application the district judge reasoned that since Cain had no prior knowledge that Adkins intended to implicate Brooks, no actual conflict existed. This fails to give proper consideration to the professionally impossible position in which Cain was placed from the moment Adkins testified about Johnson's involvement in the crime. Additionally, the district judge construed testimony by Adkins and Johnson at the state habeas proceeding to mean that Adkins did not intend to implicate Johnson in his surprise trial testimony. Our review of the record compels a contrary conclusion. Regardless, we question the relevance of Adkins' intentions.

As we stated at the outset, this case is controlled by the Supreme Court's disposition in *Holloway v. Arkansas*, *supra*. In *Holloway* one attorney was appointed to represent three defendants. He requested, before trial, that separate counsel be appointed, raising the spectre of conflict if one attorney tried to represent all three. When he learned that all defendants might testify, the attorney in *Holloway* resubmitted his motion on the ground that he would not be able to properly examine his clients for fear he might intrude upon the attorney-client privilege. The motion was again denied and the defendants were ultimately found guilty. The Supreme Court reversed their convictions, holding that the failure of the trial court to appoint separate counsel deprived the defendants of their Sixth Amendment guarantee of the effective assistance of counsel.

[1] In the case *sub judice* the district court placed too great an emphasis on Cain's inability to make an accurate pretrial prediction of the exact problems that would arise. Cain's pre-trial motion, merely stating that separate counsel would be necessary to avoid a conflict, is quite similar to the motion in *Holloway* which was found to be sufficient to apprise the trial court of potential conflict. We have applied the rationale of *Holloway* in a situation where *no* request for separate counsel was made, concluding that ineffective representation by a lawyer laboring under a conflict of interest renders the trial fundamentally unfair whether the judge knew of the conflict or not. *Stephens v. United States*, 595 F.2d 1066 (5th Cir. 1979). Unlike most Fourteenth Amendment due process cases, no state action in the form of a state official's knowledge of the wrongdoing need be shown. A deprivation of due process results when the judgment reached in such a trial is enforced. *Zuck v. State of Alabama*, 588 F.2d 436 (5th Cir. 1979).

[2-4] The mere fact that one lawyer represents more than one co-defendant does not automatically establish a conflict of interest. *Holloway*, 435 U.S. at 482, 98 S.Ct. at 1177; *United States v. Risi*, 603 F.2d 1193 (5th Cir. 1979). Further, an actual rather than a speculative conflict of interest must be shown before the constitutional guarantee of effective assistance of counsel is implicated. *Zuck*, *supra*, 588 F.2d at 439; *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1973). The constitutional implication occurs when a defense attorney is placed in a situation "inherently conducive to divided loyalties." *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974). We believe that Cain was clearly placed in such a situation. Cain was put in an untenable professional position when the court ap-

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pointed him to represent all three defendants despite the apparent potential for conflict. The court should have extricated him from this position upon his initial request. The representations of an attorney, as an officer of the court, that he perceives a potential conflict should be given very serious consideration. *Holloway*, 435 U.S. at 486, 98 S.Ct. at 1179. The state district judge's failure to grant that first motion, pre-*Holloway*, is understandable. The denial of the renewed motion, after Adkins' surprise testimony inculpating Johnson, is not so easily understood. An injustice was done to Cain and the constitutional right to effective assistance of counsel was denied Johnson.

We need not inquire into the specific prejudice suffered by Johnson as a result of his lawyer's unavoidable divided loyalties, nor should we speculate on whether he would have been convicted regardless. Cain's inability to function in a conflict-free atmosphere violated Johnson's constitutional right to the assistance of counsel, a right so basic to a fair trial that its infraction cannot be treated as harmless error. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The fact that Cain was present during the entire trial proceeding is of no moment. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway, supra*, 435 U.S. at 490, 98 S.Ct. at 1181. For this reason, the Court held in *Holloway* that when an actual conflict exists prejudice need not be proven, reversal is automatic. As the Supreme Court said in the landmark case, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942):

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder v. Massachusetts*, 291 U.S. 97, 116 [54 S.Ct. 330, 336, 78 L.Ed. 674]; *Tumey v. Ohio*, 273 U.S. 510, 535 [47 S.Ct. 437, 445, 71 L.Ed. 749]; *Patton v. United States*, 281 U.S. 276, 292 [50 S.Ct. 253, 256, 74 L.Ed. 854]. And see *McCandless v. United States*, 298 U.S. 342, 347 [56 S.Ct. 764, 766, 80 L.Ed. 1205].

315 U.S. at 75–76, 62 S.Ct. at 467.

The reason behind the dispensation of the requirement of proving prejudice should become apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone. In *Risi v. State of Alabama*, 588 F.2d 436 (5th Cir. 1979), we decried the inadequacy of a trial transcript when one seeks to assess a lawyer's trial performance for subtle variations in demeanor and lack of vigor and depth of cross-examination cannot be truly reflected in the pages of a transcript.

In a case when the attorney is confronted with a conflict of interest between co-defendants prejudice must be presumed and, except under the most extraordinary circumstances, the error cannot be considered harmless.

We conclude that Cain's conflict of interest operated to make Johnson's trial fundamentally unfair and constitutionally infirm. The decision of the district court denying habeas corpus relief is reversed; habeas relief is to be appropriately granted. The matter is remanded for entry of a proper judgment.

REVERSED and REMANDED.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-60

JOSEPH S. HOPPER,
Warden,
Petitioner

vs.

JAMES ANDREW JOHNSON
a/k/a JERRY LEON BROOKS,
Respondent

Motion For Leave To Proceed

In Forma Pauperis

The respondent, JAMES ANDREW JOHNSON, a/k/a JERRY LEON BROOKS, who is now held at the Central Correctional Institute in Macon, Georgia, a facility of the Georgia Department of Corrections, asks leave to file his "Brief In Opposition To The Writ of Certiorari" without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The undersigned counsel has been appointed to represent respondent in the Middle District of Georgia pursuant to the Criminal Justice Act (18 USC §3006 (d)(6)) as shown by the attached exhibits.

Howard Jay Manchel
Counsel for James A. Johnson

Suite 3311, 101 Marietta Tower
Atlanta, Georgia 30303
404-522-1701

Certificate of Service

I, Howard J. Manchel, Attorney for Respondent, hereby certify that I have served a copy of the foregoing Motion upon Susan Boleyn, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia, by depositing same in the U.S. mail with sufficient first class postage.

Howard J. Manchel

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

JERRY LEON BROOKS, a/k/a ANDREW JOHNSON,	:	
Petitioner,	:	CIVIL ACTION
-vs-	:	FILE NO. 78-1-Col.
JOE S. HOPPER, Warden,	:	
Defendant.	:	

ORDER APPOINTING COUNSEL

This Court being satisfied that the Defendant, above-named, is financially unable to employ counsel;

It is hereby ORDERED that Howard J. Manchel, is appointed to represent the Defendant in the above-designated case unless relieved by an Order of this Court or by Order of the Court of Appeals.

And it is so ORDERED this the 17 day of September, 1979.

J. Robert Elliott

J. ROBERT ELLIOTT
UNITED STATES DISTRICT COURT JUDGE

FILED
at 3:13 M
SEP 17 1979
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

FILED
at 11:50 M. A M
NOV 13 1979
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

JERRY LEON BROOKS, a/k/a JAMES A. JOHNSON,	:	
Petitioner,	:	CIVIL ACTION
	:	NO. 78-1-61
vs.	:	
	:	NOTICE OF APPEAL
JOSEPH S. HOPPER, WARDEN GEORGIA STATE PRISON,	:	
Respondent.	:	

Notice is hereby given that JERRY LEON BROOKS, a/k/a James A. Johnson, petitioner above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 2nd day of November, 1979.

This 6 day of November, 1979.

Howard J. Manchel
HOWARD J. MANCHEL
Attorney for Jerry L. Brooks

101 Marietta Tower
Suite 3311
Atlanta, Georgia 30303

ORDER

Defendant's request to proceed upon appeal in forma pauperis in hereby granted.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE